IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 138

UNITED STATES OF AMERICA, *Petitioner*

v.

AMERICAN-FOREIGN STEAMSHIP CORP., ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR AMERICAN-FOREIGN STEAMSHIP CORPORATION IN OPPOSITION

ARTHUR M. BECKER
839-17th Street, N. W.
Washington 6, D. C.
Counsel for Respondent

Of Counsel:
GERALD B. GREENWALD
Washington, D. C.

August, 1959

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

CITATIONS

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 138

UNITED STATES OF AMERICA, *Petitioner*

v.

AMERICAN-FOREIGN STEAMSHIP CORP., ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR AMERICAN-FOREIGN STEAMSHIP CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York dated May 11, 1956 (R. 26a-29a) is reported as *A. H. Bull Steamship Co. v. United States*, 141 F. Supp. 58. The opinion of the three-judge panel of the Court of Appeals dated September 25, 1957 (Pet. app. 14-22), the opinion of the Court of Appeals on rehearing in banc dated July 28,

1958 (Pet. app. 23-44), and the opinion of the Court of Appeals denying the petition for further rehearing in banc dated March 26, 1959 (Pet. app. 44-48), are reported at 265 F. 2d 136, *et seq.*

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

Is a circuit judge, who has been designated and assigned under 28 U.S.C. 46(c) as a member of a court of appeals in banc to hear and determine the issues in a case, competent under 28 U.S.C. 43 (b), 28 U.S.C. 46(c), 28 U.S.C. 296 and 28 U.S.C. 371 to participate in the court's in banc decision reached after his retirement from regular active service?

STATUTES INVOLVED

28 U.S.C. 43(b) provides:

> "Each court of appeals shall consist of the circuit judges of the circuit in active service. The circuit justice and justices or judges designated or assigned shall also be competent to sit as judges of the court."

28 U.S.C. 46(c) provides:

> "Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit."

28 U.S.C. 296 provides:

"A justice or judge shall discharge, during the period of his designation and assignment, all judicial duties for which he is designated and assigned. He may be required to perform any duty which might be required of a judge of the court or district or circuit to which he is designated and assigned.

"Such justice or judge shall have all the powers of a judge of the court, circuit or district to which he is designated and assigned, except the power to appoint any person to a statutory position or to designate permanently a depository of funds or a newspaper for publication of legal notices.

"A justice or judge who has sat by designation and assignment in another district or circuit may, notwithstanding his absence from such district or circuit or the expiration of the period of his designation and assignment, decide or join in the decision and final disposition of all matters submitted to him during such period and in the consideration and disposition of applications for rehearing or further proceedings in such matters."

28 U.S.C. 371 provides in pertinent part:

"Any justice or judge of the United States appointed to hold office during good behavior may retain his office but retire from regular active service after attaining the age of seventy years and after serving at least ten years continuously or otherwise....He shall, during the remainder of his lifetime, continue to receive the salary of the office."

STATEMENT

1. Respondent's Cause of Action

Respondent is a steamship company which chartered certain war-built vessels from the Maritime Commission in 1946 and 1947 in accordance with section 5 of the Merchant Ship Sales Act (50 U.S.C. App. 1738). Respondent is suing the Government under the Suits in Admiralty Act (46 U.S.C. 741 *et seq.*) because the Maritime Adminisfration[1] breached the Maritime Commission's agreement in clause 13 of the charter to refund certain excessive preliminary payments of so-called "additional charter hire" upon the completion of final audit of respondent's accounts.[2] The facts material to the consideration of the question presented in the Government's petition[3] are:

Respondent had chartered certain war-built vessels from the Maritime Commission in 1946 and 1947 and returned the last of them in 1949. In September 1951 and September 1953, respondent made certain preliminary payments on account of additional charter hire to the Maritime Administration, successor to the Maritime Commission, under a specific agreement contained

---

[1] The chartering functions of the Maritime Commission were transferred to the Maritime Administration effective May 24, 1950 in accordance with Reorganization Plan No. 21 of 1950 (64 Stat. 1273, *et seq.*). See note set out under 46 U.S.C.A. 1111.

[2] Petitioner mistakenly asserts that respondent sued to recover an illegal exaction of *payments* of additional charter hire. (Pet. 3-4) As the court below held, the suit was for *breach* of the Maritime Commission's *agreement* in Clause 13 of the charter to return excessive *preliminary payments* deposited by respondent on account of additional charter hire. (Pet. app. 29-32)

[3] The facts material to the substantive issues decided by the court below are set forth in the conditional cross-petition for a writ of certiorari filed herewith.

in Clause 13 of the charter that any overpayments would be refunded to it "upon final audit" of its accounts.[4]

On October 21, 1954, respondent submitted its final accounting and demanded the refund of overpayments upon final audit of those accounts in accordance with the pertinent provisions of Clause 13 of the charter and the instuctions and regulations of the Maritime Administration. On November 3, 1954, the Maritime Administration refused to return such overpayments upon final audit in accordance with Clause 13, and on November 24, 1954 respondent sued in admiralty in the Southern District of New York for breach of that agreement.

---

[4] The pertinent provisions of Clause 13 are:

"The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire and on account of any additional charter hire accrued under any War Shipping Administration Form 203 (WARSHIPDEMISEOUT) charter (prior to the times of payment provided for above or in such WARSHIPDEMISEOUT charters) at such times and in such manner and amounts as may be required by the Owner; provided, however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required." (R. 22a)

Some, but not all, of the regulations and instructions of the Maritime Administration confirming this agreement are referred to in the in banc decision of the court below. See Pet. app. 26-27 and Fn. 4.

2. The Proceedings Below

The Government appeared specially and excepted to the jurisdiction of the district court on the ground that

> "This [District] Court lacks jurisdiction over the subject matter of this suit and over the respondent for the reason that this suit was not commenced within two years after the cause of action alleged in the libel arose, as required under Section 5 of the Suits in Admiralty Act, 46 U.S.C. 745." (R. 19a)

and moved the exception for hearing (R. 57).

The exception was sustained and the libel dismissed on authority of *Sword Line, Inc.* v. *United States*, 228 F. 2d 344, aff'd on rehearing, 230 F. 2d 75, aff'd as to admiralty jurisdiction, 351 U.S. 976, and *American Eastern Corp.* v. *United States*, 133 F. Supp. 11, aff'd, 231 F. 2d 664. District Judge Palmieri said:

> "The impact of these decisions is that the causes of action, if any, accruing to the libelants with respect to any payments made to the Maritime Commission arose upon redelivery of the vessels. The position consistently taken by the Government in these cases and justified by the authorities, has been that any payments made after redelivery of the vessels (the charters being thereby terminated) must be deemed to have been made voluntarily regardless of any accompanying protests." (R. 26a-27a.)

The last of the chartered vessels had been redelivered on December 28, 1949 (R. 4a). The preliminary payments were made on September 21, 1951 and September 21, 1953 (R. 20a-21a). The district court therefore held that it lacked jurisdiction and dismissed the amended libel because it found that the payments were voluntarily made, an issue which was not before the

court on the Government's motion,[5] which respondent did not know the court was entertaining, and concerning which respondent was given no opportunity "to secure and present evidence." Cf. *Washington ex rel. Ore. R. & N. Co.* v. *Fairchild*, 224 U.S. 510, 526, and *Morgan* v. *United States*, 304 U.S. 1, 18.

On appeal, a three-judge panel of the Court of Appeals, consisting of Circuit Judges Medina and Hincks, and District Judge Leibell, in an opinion written by Judge Hincks, affirmed on authority of *Sword Line* and *American Eastern*, although the court expressed doubts as to the correctness of those decisions. It said:

---

[5] Rule 9(a) of the General Rules of United States District Courts for the Southern and Eastern Districts of New York provides that:

"Notice of motion in all actions or proceedings shall be in the time and manner as provided in the Rules of Civil Procedure for the United States District Courts."

Rule 6(d) of the Federal Rules of Civil Procedure provides:

"A written motion other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing. . . ."

Rule 7(b)(1) of the Federal Rules of Civil Procedure provides:

"An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion." (Emphasis supplied.)

Inasmuch as the Government's exception (R. 19a) and motion bringing the exception on for hearing (R. 57) went only to the question of whether the suit was timely brought so as to invest the district court with jurisdiction; issues going to the merits, such as voluntary payment, were not before the district court. Cf. *McNichols* v. *Lennox Furnace Co.*, 7 F.R.D. 40, 42 (N.D.N.Y. 1947); *Metropolitan Life Ins. Co.* v. *Everett*, 15 F.R.D. 498, 499 (S.D.N.Y. 1954).

"If the subject-matter of these appeals were *res nova*, we are by no means sure that our dispositions would coincide with those made by the majority opinion in *Sword Line* and by *American Eastern*. However, we will not overrule these recent decisions of other panels of the court. On the authority of *Sword Line* and *American Eastern* we hold that these libels also were barred." (Pet. app. 21.)

Rehearing in banc was granted on December 19, 1957, and on rehearing, the majority of the court (Judges Hincks, Medina and Moore) in an opinion again written by Judge Hincks, reversed the district court and held that since the preliminary payments on account of additional charter hire were made pursuant to the charter agreement, and specifically Clause 13 thereof, the rights of the parties depended upon that clause. Clause 13 provided that upon the completion of *final audit* "overpayments would be refunded to the charterer as required." The Government, however, on rehearing contended *for the first time* (Pet. app. 29-30) that the words "final audit" in Clause 13 were used in the sense of "annual audit," and the court said that the Government should have an opportunity to plead and to prove that contention (Pet. app. 30). The court therefore held that all claims "were reserved by Clause 13 until 'final audit' whatever that term shall be determined to mean," (Pet. app. 32) and that the issue as to the sense in which "final audit" was used in Clause 13 "should be submitted to the trial judges for findings and determination after giving the Government opportunity to raise such issues of fact as may be desired." (Pet. app. 30)

The court did not pass upon the Government's contention that the preliminary payments were volun-

tary payments because it said this was an "issue going to the merits" and not germane to the question of jurisdiction. (Pet. app. 27-28, and fn. 5) Cf. *Binderup v. Pathe Exchange*, 263 U.S. 291, 304-05. The court also overruled the *Sword Line* and *American Eastern* decisions to the extent that they were inconsistent with its decision.

Judges Clark and Waterman dissented in separate opinions.[6] Judge Clark raised the question now presented in the Government's petition. He expressed doubt as to the authority of Judge Medina to participate in the court's decision because he had retired from regular active service after the case had been presented to the court in banc but before a decision had been reached.

The Government petitioned for further rehearing in banc principally on the ground that Judge Medina was disqualified from participating in the court's decision because of his retirement on March 1, 1958. The petition was denied, the court dividing as it had in deciding the case on rehearing in banc. The majority held that Judge Medina

> "who under § 46(c) was designated and assigned as a member of the court *in banc* [prior to his retirement] was competent even after his retirement to sit under §§ 43(b), 294(b) and 296." (Pet app. 46)

In a separate statement Judges Clark and Waterman expressed the view that 28 U.S.C. 46(c) prohibited Judge Medina's participation in the case after his

[6] The bases of their dissents to the court's decision on the merits are discussed in the conditional cross-petition for a writ of certiorari filed herewith.

retirement from regular active service. (Pet. app. 47-48)

On June 23, 1959, the Government filed its petition for a writ of certiorari. On July 1, 1959, the time of respondent to file its brief opposing issuance of the writ was extended by this Court until August 24, 1959.

ARGUMENT

The Government does not assert that the court below in its interlocutory judgment wrongly decided the issues before it. The question it presents in its petition is limited to whether Judge Medina was competent under the pertinent statutes to participate therein.

The petition should be denied for the following reasons: (1) The determination of the question presented will not affect the validity of the in banc decision, or in consequence, the rights of the parties in this case (Cf. *Nashville C. & St. L. R. Co.* v. *Wallace*, 288 U.S. 249, 259); (2) The question presented by the Government was correctly decided by the court below; (3) The practice in all other circuits in which the question has arisen conforms to that of the court below; and (4) The court below correctly decided the substantive issues before it.

I. The Determination of the Question Presented by the Government Will Not Affect the Validity of the In Banc Decision or, in Consequence, the Rights of the Parties in This Case

This is not a case where challenge is made to the propriety of *action* taken by a judge, as for example, his participating in an appeal from a case he heard as a trial judge (cf. *American Construction Co.* v. *Jacksonville T. & K. W. R. Co.*, 148

U.S. 372, 387) or his holding a term of court in violation of the rules of the court (cf. *Johnson* v. *Manhattan R. Co.*, 289 U.S. 479). The objection here is not to what Judge Medina *did* but to what he *was*. The Government here questions his *status*, i.e., whether he was the kind of circuit judge authorized by the judicial code to participate in the in banc decision. The validity of the in banc decision does not rest upon the determination of that question.

Judge Medina did not participate in the in banc decision as a mere usurper. He continued to hold the office of circuit judge of the Court of Appeals notwithstanding his retirement from regular active service. *Booth* v. *United States*, 291 U.S. 339, 350-51. He participated in the decision in good faith under color of the authority of the office he held. He participated therein under his designation and assignment before retirement as a member of the court in banc to hear and determine this case, just as under color of the same authority and under similar designation and assignment before retirement he had participated, between the time of his retirement and the time of this decision, in decisions of 36 other cases (in 20 of which the Government was a party)[7] which were pending in divisions of the Court of Appeals when he retired from regular active service.

A judge who continues in good faith to perform judicial functions after his statutory authority has expired is a *de facto* judge. *Ball* v. *United States*, 140 U.S. 118, 128-29; *United States* v. *Marachowsky*, 213 F. 2d 235, 244-45 (7th Cir., 1954), cert. denied, 348 U.S. 826; *Sylvia Lake Co.* v. *Northern Ore*

[7] These cases are listed in the appendix hereto, page 1a, *post*.

Co., 242 N.Y. 144 (1926), cert. denied, 273 U.S. 695; *State ex rel. Jugler* v. *Grover*, 102 Utah 459, 462, (1942). Cf. *Waite* v. *City of Santa Cruz*, 184 U.S. 302, 322-24.

So long as he is not restrained from performing judicial functions in a *quo warranto* proceeding to which he *must* be a party (*Johnson* v. *Manhattan R. Co.*, 289 U.S. at 502), his official acts are as binding upon litigants as those of a *de jure* judge.[8]

[8] The principle that the acts of a de facto judge are as binding upon litigants as those of a de jure judge is said to be "recognized in all jurisdictions." *Sylvia Lake Co.* v. *Northern Ore Co.*, 242 N.Y. 144, 147 (1926), cert. denied, 273 U.S. 695. Courts of Appeals in seven circuits have recognized it. *Luhrig Collieries Co.* v. *Interstate Coal & Dock Co.*, 287 Fed. 711, 713 (2d Cir., 1923), cert. denied, 262 U.S. 751; *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 266 F. 2d 427, 430, fn. 1 (3d Cir., 1959); *Sharfsin* v. *United States*, 265 Fed. 916, 917-18 (4th Cir., 1920); *Sykes* v. *Sanford*, 150 F. 2d 205 (5th Cir., 1945); *United States* v. *Marachowsky*, 213 F. 2d 235, 244-45 (7th Cir., 1954), cert. denied, 348 U.S. 826; *Morris* v. *United States*, 19 F. 2d 131, 133 (8th Cir., 1927); *Leary* v. *United States*, decided May 18, 1959 (9th Cir. No. 15,290), not yet reported. Cases from twenty-two States, the then Territory of Hawaii, and Canada in which courts have applied or expressly approved the principle are collected in 144 A.L.R. 1207 (1943).

The entire administration of justice is said to depend upon the preservation of this principle. "The supremacy of the law could not be maintained or its execution enforced if the acts of a judge having colorable but not a legal title were to be deemed invalid." *Sylvia Lake Co.* v. *Northern Ore Co.*, 242 N.Y., at 147. Litigants could not proceed in the courts with confidence if the authority of those in possession of judicial office could be challenged by the losing party. *United States* v. *Alexander*, 46 Fed. 728, 729 (D.C. Idaho, 1891). Judges could not perform their office if compelled to defend themselves from challenge by litigants. The judge "instead of trying the rights of parties, will be continually engaged in defending his own." *Clark* v. *Commonwealth*, 29 Pa. 129 (1858), cited with approval in *Ball* v. *United States*, 140 U.S., at 129 and *Norton* v. *Shelby County*, 118 U.S., at 447.

Ex Parte Ward, 173 U.S. 452; *Ball* v. *United States*, 140 U.S. 118; *Manning* v. *Weeks*, 139 U.S. 504. See also *Norton* v. *Shelby County*, 118 U.S. 425, 441; *McDowell* v. *United States*, 159 U.S. 596.

The validity of the in banc decision therefore does not depend on whether Judge Medina had statutory authority to participate therein, and the rights of the parties consequently will not be affected by the determination of the question presented in the Government's petition. Cf. *Nashville, C. & St. L. R. Co.* v. *Wallace*, 228 U.S. 249, 259.

II. The Question Presented by the Government in the Petition Was Correctly Decided by the Court Below

The Government's argument that Judge Medina was not competent after his retirement to participate in the in banc decision rests upon Section 46(*c*) of the Judicial Code which provides that "A court in banc shall consist of all active circuit judges of the circuit."

The Government overlooks the provisions of Sections 43(b) and 296 of the Judicial Code. As the court below pointed out in its decision denying further rehearing in banc (Pet. app. 46), Judge Medina, prior to his retirement, had been designated and assigned under Section 46(c) to hear and determine this case as a member of the court in banc. Under Section 43(b)[9] he was therefore competent after his retirement to sit as a member of the court; under the first paragraph

[9] "Each court of appeals shall consist of the circuit judges of the circuit in active service. The circuit justice and justices or judges designated or assigned shall also be competent to sit as judges of the court." (28 U.S.C. 43(b))

of Section 296[10] he was directed to discharge *all* judicial duties for which he had been designated and assigned; and, under the second paragraph of Section 296,[11] he had all the powers (except certain irrelevant ones) of a judge of the court to which he had been designated and assigned. "His status [was] the same as that of any active judge, so-called." *Booth* v. *United States*, 291 U.S., at 351.

This conclusion is supported by the language of Section 371(b) under which Judge Medina retired "from *regular* active service" which implies that he remained competent to perform "active" service; by the revisor's notes to 371(b), which state that the section was rewritten from Section 260 of the former Judicial Code (former 28 U.S.C. § 375) to preserve the interpretation of the status of a retired judge declared in *Booth* v. *United States*, *supra*; and by the first paragraph of Section 456 of the present Judicial Code which refers to a retired judge "designated and assigned to active duty."

It is also supported by the established practice in the various circuits (which the Government called to the attention of the court below in its petition for further

---

[10] "A justice or judge shall discharge, during the period of his designation and assignment, all judicial duties for which he is designated and assigned. He may be required to perform any duty which might be required of a judge of the court or district or circuit to which he is designated and assigned." (28 U.S.C. 296)

[11] "Such [designated and assigned] justice or judge shall have all the powers of a judge of the court, circuit or district to which he is designated and assigned, except the power to appoint any person to a statutory position or to designate permanently a depository of funds or a newspaper for publication of legal notices." (28 U.S.C. 296)

rehearing in banc, at R. 521a) of permitting retired circuit judges to participate in divisional decisions of cases which they heard prior to retirement.

Section 294 (d) provides that "no retired justice or judge shall perform judicial duties except when designated and assigned." The court below therefore correctly pointed out that the competency of a retired circuit judge to participate in such divisional decisions rested upon his designation and assignment before retirement as a member of the divisional court to hear and determine cases before that court, just as retired Judge Medina's competency to participate in the in banc decision in this case rested upon his designation and assignment before retirement as a member of the court in banc to hear and determine this case. (Pet. app. 46.)[12]

Judge Medina was plainly competent under the pertinent provisions of the statute to participate in the in banc decision of the court below.

III. The Practice in All Other Circuits in Which the Question Has Arisen Conforms to That of the Court Below

So far as respondent is aware, similar situations have arisen only in the Fifth and Ninth Circuits. A closely analogous situation has arisen in the Third Circuit.

---

[12] As was pointed out above (p. 11, *supra*), between March 1, 1958, the date of his retirement, and July 28, 1958, the date of the in banc decision of the court below, Judge Medina, without challenge from anyone and with no designation and assignment other than his designation and assignment before he retired, participated after retirement in decisions of 36 cases, in 20 of which the Government was a party. These cases are listed in the appendix hereto, at page 1a, *post*.

The Fifth Circuit cases are *Commercial Nat. Bank in Shreveport* v. *Connolly*, decided in banc on September 6, 1949 (176 F. 2d 1004), petition for rehearing in banc denied on November 16, 1949 (177 F. 2d 514), and *United States* v. *Sentinel Fire Ins. Co.*, decided in banc on August 13, 1949, petition for rehearing in banc denied on December 2, 1949 (178 F. 2d 217). In these cases, in conformity with the views expressed by the majority of the Court of Appeals in this case (Pet. app. 46), Judge Sibley, who had sat with the court in banc in each case and participated in its decision, subsequently retired on October 1, 1949 and thereafter, as a member of the court in banc, cast the deciding vote in each case denying rehearing in banc.[13]

The Ninth Circuit cases are *Herzog* v. *United States*, 235 F. 2d 664, 670 fn.*, cert. denied, 352 U.S. 844 and

---

[13] Judge Clark's reliance upon the Government's statement in its petition for further rehearing in banc (R. 518a) that Judge Sibley did not participate in the decision of these cases is misplaced. The reports in both cases plainly state that the petition for rehearing in banc was denied *per curiam*, by the court consisting of Judge Sibley and four other judges, two of whom dissented. (177 F. 2d, at 514; 178 F. 2d, at 239.) If Judge Sibley had not participated in the in banc decisions the court would have followed the practice of noting the withdrawal of judges who do not participate in the court's decision, just as it noted that Judge Lee did not participate in the original in banc decision in the *Sentinel Fire Insurance* case. (178 F. 2d, at 219.) Cf. *United States* v. *Silverman*, 248 F. 2d, at 697 (2d Cir., 1957); *In re Sawyer*, 260 F. 2d, at 203, fn. 17 (9th Cir., 1958); *Bailey* v. *Richardson*, 341 U.S. 918. Judge Sibley's participation after retirement in the in banc decisions of the *Commercial Nat. Bank* and *Sentinel Fire Insurance* cases is further substantiated by the dissenting opinions. The dissenting judges implied that Judge Sibley was wrongfully permitted to participate in the in banc decision, that his vote should not have been counted, that therefore only two judges legally voted to deny rehearing, and that since there were six active judges in the Fifth Circuit, the vote of two judges was insufficient to deny rehearing.

In re Sawyer, 260 F. 2d 189, 203, fn. 17, rev'd on other grounds by the Supreme Court, June 29, 1959 (27 U. S. Law Week 4543). In both of these cases, the Ninth Circuit, in conformity with the views expressed by the majority of the Court of Appeals in this case, either held or implied that judges who, prior to retirement, had been designated and assigned as members of the court in banc were competent to participate in the in banc decisions reached after they had retired.

In *Herzog* v. *United States*, *supra*, the status of Judges Bone and Orr was precisely the same as that of Judge Medina in this case. As members of the court in banc they heard argument in the case, thereafter retired from regular active service, and participated after retirement in the court's in banc decision. (235 F. 2d at 670, fn.*)

The Government's charge (Pet. 11) that the Ninth Circuit "reached conflicting results" in the *Herzog* case and in *In re Sawyer* is unfounded. The court did *not* deny to retired Judge Denman the right to participate in its in banc decision in *In re Sawyer* that it had permitted retired Judges Bone and Orr to exercise under similar circumstances in *Herzog* v. *United States*. Such caprice cannot fairly be imputed to the experienced judges of the Ninth Circuit. In *In re Sawyer*, the court carefully explained that Judge Denman did not participate in the in banc decision because he thought it "inappropriate" to do so. (260 F. 2d, at 203, fn. 17.) The explanation lacked point unless the court assumed that retired Judge Denman was *authorized* to participate in the in banc decision if he were willing to assume that judicial duty.

The Third Circuit case is *Bishop* v. *Bishop*, 257 F. 2d 495 (1958). There Judge Magruder, an active circuit

judge of the *First Circuit*, sat by designation in the Third Circuit and participated in an in banc decision denying rehearing in banc. Since 28 U.S.C. 46(c) requires a rehearing in banc to be ordered "by a majority of the circuit judges *of the circuit* who are in active service," the case holds, in conformity with the views of the court below, that the status of a judge designated and assigned to the in banc court is the same as that of an active judge of the circuit for the purpose of participating in an in banc decision.[14]

These are all the cases of which respondent is aware in which the question presented by petitioner or an analogous question has arisen.[15] In all of

[14] Judge Maris, a member of the court in banc, obviously acquiesced in Judge Magruder's participation in the court's in banc decision. It will be recalled that Judge Maris, as Chairman of the Judicial Conference Committee on the Revision of the Judicial Code, submitted the memorandum which is the genesis of the present 28 U.S.C. 46(c). See *Western P.R. Corp.* v. *Western P.R. Co.*, 345 U.S. 247, 253-54.

[15] None of the cases cited by the Government (Pet. 11-12) to show "conflict or confusion" are in point. None of them involves the question presented in the petition. All except *United States* v. *Silverman*, 248 F. 2d 671, cert. denied, 355 U.S. 942, were cases in which retired judges who participated in panel decisions were not thereafter designated and assigned to the rehearing by the court in banc. Whether they should have been permitted to sit with the in banc court may be an interesting and important question. But it is not the question presented in this case. Judge Medina *was* designated and assigned to the court in banc, and the question presented here concerns his status as a member of that court after retirement.

Judge Medina and other Second Circuit judges did not withdraw from in banc proceedings in the cases cited at page 11 of the Petition (or in any other cases of which respondent is aware) as the Government says they did.

In the *Silverman* case, the same active judges who sat on the panel which decided the case subsequently participated in the rehearing in banc, and the Government's purpose in citing this case is not readily apparent.

them the result was the same—the retired judge or designated judge was permitted to participate in the court's in banc decision.

There is, therefore, no conflict or confusion in the circuits warranting the exercise of certiorari jurisdiction.

IV. The Court Below Correctly Decided the Substantive Issues Before It

The Court of Appeals decided in its in banc decision that respondent's cause of action for breach of the Maritime Commission's agreement to return upon final audit certain excessive preliminary payments of additional charter hire did not arise until the Maritime Administration refused to return such payments upon final audit, and that the issue of voluntary payment was not germane to the issue of jurisdiction (Pet. app. 27-29). Cf. *Binderup* v. *Pathe Exchange*, 263 U.S. 291, 304-05.

The court was plainly correct and the Government is not challenging its decision on the merits. The Government asks this Court to review not because it contends that the case was wrongly decided but because it contends that Judge Medina's participation made the decision invalid. Respondent does not agree.

It is respectfully submitted that this is an appropriate case in which this Court should "make such disposition of the case as justice may at this time require". *Langnes* v. *Green*, 282 U.S. 531, 536-437. Inasmuch as the decision of the court below on the merits is incontestably correct, justice requires that it be affirmed without regard to the question of the effect of

Judge Medina's participation therein. There is therefore little point in deciding that question.[16]

CONCLUSION

For these reasons, it is respectfully submitted that the Government's petition for a writ of certiorari should be denied.

Respectfully submitted,

ARTHUR M. BECKER
839 - 17th Street, N. W.
Washington 6, D. C.

Counsel for Respondent

Of Counsel:

GERALD B. GREENWALD
Washington, D. C.

August, 1959.

[16] In order to present the substantive issues in this case more clearly to the Court, respondent herein is filing simultaneously herewith a conditional cross-petition for a writ of certiorari, asking this Court to review the substantive issues in the case as well as the question presented by the Government in its petition if the Court grants the Government's petition for a writ of certiorari herein.

APPENDIX

Decisions in Which Judge Medina Participated Between the Date of His Retirement From Regular Active Service and the Date of the In Banc Decision of the Court Below

Case	Decided
Perlman v. *Commissioner of Internal Revenue*, 258 F. 2d 890	Mar. 4, 1958
Vermont Structural Slate Co. v. *Tatko Bros. Slate Co.*, 253 F. 2d 29	Mar. 6, 1958
Riegelman's Estate v. *Commissioner of Internal Revenue*, 253 F. 2d 315	Mar. 10, 1958
United States v. *Paradise*, 253 F. 2d 319	Mar. 26, 1958
Maher v. *Isthmian Steamship Co.*, 253 F. 2d 414	Mar. 11, 1958
In re New Haven Clock & Watch Co., 253 F. 2d 577	Mar. 28, 1958
In re Allen N. Spooner & Sons, Inc., 253 F. 2d 584	Mar. 10, 1958
New York Credit Men's Adjustment Bureau, Inc. v. *Samuel Breiter & Co.*, 253 F. 2d 675	Mar. 25, 1958
United States v. *15.03 Acres of Land*, 253 F. 2d 698	Apr. 2, 1958
Norda Essential Oil & Chemical Co. v. *United States*, 253 F. 2d 700	Jan. 31, 1958
Rehearing denied	Apr. 14, 1958
Lewis v. *Commissioner of Internal Revenue*, 258 F. 2d 821	Apr. 7, 1958
Excelsior Hardware Co. v. *John Hancock Mut. L. Ins. Co.*, 254 F. 2d 6	Apr. 7, 1958
Frasier v. *Public Service Interstate Trans. Co.*, 254 F. 2d 132	Apr. 16, 1958
Bennett v. *The Mormacteal*, 254 F. 2d 138	Mar. 13, 1958
United States ex rel. Farnsworth v. *Murphy*, 254 F. 2d 438	Apr. 15, 1958
United States v. *Palmiotti*, 254 F. 2d 491	Apr. 18, 1958
Monteiro v. *Sociedad Mar. San Nicolas, S.A.*, 254 F. 2d 514	Apr. 14, 1958
Murray v. *New York, N. H. & H. R. Co.*, 255 F. 2d 42	May 5, 1958

Case	Decided
Roth v. *United States*, 255 F. 2d 440	May 22, 1958
United States v. *A-1 Meat Co.*, 255 F. 2d 491	May 23, 1958
United States v. *Eastport Steamship Corp.*, 255 F. 2d 795	May 6, 1958
Grace Line, Inc. v. *United States*, 255 F. 2d 810	May 6, 1958
Isthmian Steamship Co. v. *United States*, 255 F. 2d 816	May 6, 1958
Isbrandtsen Co. v. *United States*, 255 F. 2d 817	May 6, 1958
United States v. *Beard*, 256 F. 2d 76	May 23, 1958
Bliss v. *Commissioner of Internal Revenue*, 256 F. 2d 533	June 18, 1958
Hight v. *United States*, 256 F. 2d 795	June 18, 1958
Wagman v. *Arnold*, 257 F. 2d 272	June 13, 1958
United States v. *Ross*, 257 F. 2d 292	July 2, 1958
Smith v. *Sinclair Refining Co.*, 257 F. 2d 328	July 7, 1958
Dellaripa v. *New York, N. H. & H. R. Co.*, 257 F. 2d 733	July 7, 1958
Georgia-Pacific Corp. v. *United States Plywood Corp.*, 258 F. 2d 124	July 1, 1958
Atalanta Trading Corp. v. *Federal Trade Commission*, 258 F. 2d 365	July 28, 1958
N. L. R. B. v. *Adhesive Products Corp.*, 258 F. 2d 403	July 3, 1958
Deep Sea Tankers, Limited v. *The Long Branch*, 258 F. 2d 757	July 14, 1958
Reardon v. *California Tanker Co.*, 260 F. 2d 369	Apr. 7, 1958